

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO

COMPANY, et al.,

Defendants.

Miami-Dade County Courthouse
Miami, Florida
Tuesday, 1:40 p.m.
May 18, 1999

TRIAL - VOLUME 319

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit

Judge,

pursuant to notice.

APPEARANCES:

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SUSAN ROSENBLATT, ESQ.

CLIFFORD DOUGLAS, ESQ.

On behalf of Plaintiffs

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ROBERT C. HEIM, ESQ.

SEAN P. WAJERT, ESQ.

On behalf of Defendant Philip Morris

COLL DAVIDSON CARTER SMITH SALTER & BARKETT

NORMAN A. COLL, ESQ.

On behalf of Defendant Philip Morris

ZACK KOSNITZKY

STEPHEN N. ZACK, ESQ.

On behalf of Defendant Philip Morris

CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER

R. BENJAMINE REID, ESQ.

DOUGLAS CHUMBLEY, ESQ.

On behalf of Defendant R.J. Reynolds

JONES, DAY, REAVIS & POGUE

RICHARD M. KIRBY, ESQ.

DIANE PULLEY, ESQ.

On behalf of Defendant R.J. Reynolds

KING & SPALDING

MICHAEL RUSS, ESQ.

RICHARD A. SCHNEIDER, ESQ.

On behalf of Defendant Brown & Williamson

CLARKE SILVERGLATE WILLIAMS & MONTGOMERY

KELLY ANNE LUTHER, ESQ.

On behalf of Defendants Liggett Group

and Brooke Group

SHOOK HARDY & BACON

EDWARD A. MOSS, ESQ.

WILLIAM P. GERAGHTY, ESQ.

On behalf of Defendant Brown & Williamson

JAMES T. NEWSOM, ESQ.

On behalf of Defendant Lorillard

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APPEARANCES (Continued)

DEBEVOISE & PLIMPTON
ANNE COHEN, ESQ.
JOSEPH R. MOODHE, ESQ.
On behalf of Defendant The Council for Tobacco

Research

GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL
DAVID L. ROSS, ESQ.
On behalf of Defendant Lorillard
MARTINEZ & GUTIERREZ
JOSE MARTINEZ, ESQ.
On behalf of Defendant Dosal Tobacco Corp.
and Tobacco Institute
KASOWITZ BENSON TORRES & FRIEDMAN
AARON MARKS, ESQ.
NANCY STRAUB, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

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E X H I B I T S

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EXHIBITS	PAGE	PAGE	PAGE
None			

DEFENDANTS'	OFFERED	ADMITTED	FOR ID
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(Whereupon, the following proceedings were had:)
THE COURT: Okay. Let me see counsel over
here in sidebar.
(Discussion off the record)

5 (The following proceedings were had at
6 sidebar:)
7 MR. HEIM: I told Stan I'm probably going
to
8 be maybe another hour, roughly an hour and a half,
9 somewhere in that neighborhood, and I'll be finished
10 with the witness on direct. This is a transcript of
11 his testimony as it was put in by the plaintiffs,
which
12 I'm going to leave with the Court; that is, the
13 plaintiffs have already put in his testimony, their
14 cross examination on the subjects of causation and
15 addiction. And I've marked it up with yellow being
16 causation and pink being addiction. I'm doing only
17 marketing with this witness.
18 So I just wanted to tell Your Honor that
19 these are subjects which I haven't raised, I'm not
20 going to, which have been covered in his prior
21 testimony as submitted. So I just want to make that
22 point for purposes of cross examination.
23 THE COURT: Sir?
24 MR. ROSENBLATT: No comment at this point.
25 THE COURT: You know the rules. I think

you

34760

the

folks.

break

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system

1 know the rules. Maybe you don't.
2 MR. ROSENBLATT: Never assume that I know
3 rules.
4 What rules?
5 (Discussion off the record.)
6 (The sidebar conference was concluded, and
7 the following proceedings were held in open court:)
8 THE COURT: I guess we're ready to get the
9 jury out, please.
10 Mr. Morgan.
11 THE BAILIFF: Bringing in the jury.
12 (The jurors entered the courtroom.)
13 THE COURT: All right. Have a seat,
14 Let's proceed.
15 CONTINUED DIRECT EXAMINATION
16 OF JAMES J. MORGAN
17 BY MR. HEIM:
18 Q. Good afternoon, everybody.
19 Mr. Morgan.
20 A. Mr. Heim.
21 Q. Mr. Morgan, before the break we had been
22 talking about Philip Morris' marketing activities,
23 promotional activities vis-a-vis competitors. And I
24 want to focus in on this period after the lunch
25 on youth marketing, youth advertising, the whole

1 subject of youth, young people, underage people.
2 That's where I'm heading with these questions.
3 And let me start with some basics. Does
4 Philip Morris sell any of its cigarette products
5 directly to consumers?
6 A. No. No. The cigarette distribution

7 basically works that Philip Morris is a
manufacturer,
8 sells to wholesalers, or distributors.
9 Q. Are they separate companies?
10 A. Who?
11 Q. The wholesalers and distributors?
12 A. They're individual companies. So in Miami
13 there may be three or four wholesalers. Philip
Morris
14 also sells to chains, so Winn-Dixie for example.
The
15 title to those cigarettes, the sale is complete at
that
16 point. Then the distributor will sell to the local
mom
17 and pop, the little store on the corner. Winn
Dixie,
18 of course, will distribute from its warehouse to its
19 outlets.
20 But the sale at retail of cigarettes is at
21 least one if not two steps removed from the
22 manufacturer themselves. Of course, the sale at
retail
23 is subject to state laws. The retailers are
licensed
24 to sell cigarettes by the state, and any and all
laws
25 are enforced by the state and are part of the
licensing
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1 process.
2 Q. Do you have to be licensed to sell
cigarettes
3 at retail?
4 A. In most states you do. I don't want to
say
5 every state because there may be an exception. But
6 generally speaking, the state licenses you to sell
7 cigarettes.
8 Q. And does Philip Morris have any retail
9 outlets of its own?
10 A. None.
11 Q. All of its cigarettes go through the chain
12 that you talked about?
13 A. Either the wholesale distributor or the
chain
14 itself, yes.
15 Q. Now, in looking back at your years at
Philip
16 Morris, I think you said roughly 30, in every
different
17 kind of position that you've held in marketing, did
you
18 ever participate in a meeting where there was a
19 discussion of how to attract underage smokers?
20 A. Absolutely not.
21 Q. In all your years at the company, did you
22 ever see a planning document or a strategy document
23 where there was an objective to try to reach somehow
24 underage smokers, minors?
25 A. Absolutely not.

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that 1 Q. What has been the company's position on
2 subject over the course of those years?

3 A. Well, I think it's very simple, which is
4 Philip Morris does not market or sell and has no
5 intention to do so, does not do so, and actually

takes 6 many affirmative steps to make sure that it doesn't
7 happen, sell to either nonsmokers or to minors.

8 Q. Now, in the course of your positions that
9 you've held that you described to the jury this
10 morning, roughly -- I don't know whether you can do
11 this or not, but could you approximate how many
12 marketing, advertising, promotion, put them all

under 13 the heading of marketing, can you approximate how
many 14 marketing documents have been produced by the

marketing 15 department at Philip Morris over those years?
16 A. Well, I know there are 250,000 at least,
17 because that's the number that were turned over to

the 18 plaintiffs' lawyers in the Minnesota case. And
those 19 are all marketing documents. So a minimum of

250,000. 20 I don't know the exact number.
21 Q. Now, you've testified that in all your
22 experience and all the documents you've ever seen,
23 you've never seen a document, going back to when you
24 started with the company in 1963, where Philip

Morris 25 has targeted or said we're trying to attract
nonsmokers

34764 1 or underage smokers.
2 Now, I want to ask you about a different

kind 3 of document. Have you ever seen any documents over
all 4 those years where the company or somebody at the
5 company has reported on or analyzed underage

smokers? 6 A. Yes.
7 Q. And what have you seen?
8 A. Well, I've basically seen them as a result

of 9 these four court appearances and depositions,
because, 10 of course, those are what come out of the bag when
11 people are trying to make this assertion that I know

is 12 false.
13 They're basically two things that I've

seen. 14 One is, I don't know, it depends, it's 7, 8, 9, 10
15 memos from a gentleman named Myron Johnston.

16 Q. Myron?
17 A. Myron Johnston. Myron worked in Richmond

in 18

18 the research and development department. And Myron
had
19 been a government demographer and he had done
analyses
20 of public data; in other words, underage cigarette
21 consumption, the Center for Disease Control,
Department
22 of Health and Human Services, University of
Michigan.
23 There are a number of people who reported regularly
on
24 the incidence of smoking on the below-18 market.
25 Myron Johnston took that public
information

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1 as a demographer and did write 7, 8 or 9 memos over
the
2 course of 20 years that showed what smoking
incidence
3 was below 18. So that's one group of documents.
4 There's one other document which comes to
the
5 fore, which is a mistake that Philip Morris made and
it
6 was in 1974. It was a Roper study, a research
study,
7 where Philip Morris actually -- and this is the only
8 instance I know of -- actually authorized a research
9 company to take an ongoing piece of research that
was
10 being done among 18 and over, and in that one time
11 actually told Roper that they were free to interview
12 people below 18.
13 So there's that one time out of 30 years
of
14 research, and then there's this collection of Myron
15 Johnston demographic analyses coming out of
Richmond.
16 Those are the documents that I'm aware of where
Philip
17 Morris looked at data. But, of course, looking at
data
18 and not doing something about it is two different
19 things. As I said, we never marketed to kids or
20 nonsmokers.
21 Q. I want to ask you about the documents that
22 you talked about, the one document you mentioned in
23 1974, 25 years ago, but is that a document that, if
you
24 remember, is that a document that you saw at the
time?
25 A. Yes. I was actually copied on that
document

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1 at the time.
2 Q. How about these Myron Johnston documents
that
3 you talked about which go over a span of time?
4 A. I think they go over like 9 or 11 years.
As,
5 you know, the government would report annually its

6 data, he'd look at, you know, people over 65. He'd
7 look at all the age groups; look at male, female,
8 ethnicity; look at geography, and he'd report out as
a
9 statistician would report out. I don't believe I
was
10 copied on any of those documents. I've seen them
11 since, you know, as part of this trial stuff.
12 Q. In litigation?
13 A. Yes. But as I remember the copy lists on
14 them, they were almost all confined primarily to
15 Richmond, to within the operations group -- I'm
sorry.
16 Richmond is where Philip Morris' main factory is and
17 where all its factory management is. These
documents
18 were basically used to project the overall size of
the
19 cigarette industry so that Philip Morris could do
20 manufacturing planning.
21 Q. I want to go a little slower over this.
22 Myron Johnston, you said, was a demographer. Maybe
we
23 should just take a minute and explain what a
24 demographer -- I think most people know what a
25 demographer is, but what is your concept of a

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1 demographer?
2 A. Well, a demographer is a professionally
3 trained, educated person who looks at the world
through
4 demographics; demographics being men and women,
5 demographics being people of different age groups,
6 people of different ethnicity, people of different
7 geographic patterns.
8 So when -- I guess the best example would
be
9 during presidential election time, when you see one
of
10 these polls and it's broken out how the candidate
11 appeals men versus women, young people versus old
12 people, south versus north, African-American versus
13 Anglo, whatever, a demographer would do the analysis
of
14 that and talk about how that differs from previous
15 elections or whatever. Looking at the world through
16 population segments.
17 Q. What department was he in?
18 A. He was in research and development in
19 Richmond. He wasn't in marketing.
20 Q. Where is the marketing group located?
21 A. New York City.
22 Q. And was any of Myron Johnston's research
in
23 these 8 or 9, or whatever it is, documents that you
24 talked about, his analysis, ever used to your
knowledge
25 by the marketing department for purposes of
advertising

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1 or promotion?

2 A. No, it was not.
3 Q. And what was it used for?
4 A. I think I said during the 1970s, when the
5 bulk of these memos reporting on public data were
6 written, Philip Morris was a growth company. We
talked
1970s. 7 about how Marlboro spurted, this morning, in the
8 It takes a long time to build a cigarette factory, a
9 long time. It's a very extensive and long process.
10 And Philip Morris was a growth company and
11 was trying to forecast what kind of factory capacity
it
12 would need in the out years, 5, 6, 7, 8 years. And
13 Myron Johnston's documents largely predicted both
the
14 size of the cigarette industry going out and the
size
15 of Philip Morris all based on demographics. A pure
16 statistical analysis of projections.
17 Q. Aside from the Roper organization document
--
18 which I think you described as 1974?
19 A. Right.
20 Q. -- was any of Myron Johnston's analysis
based
21 on research that Philip Morris did as opposed to
public
22 sources?
23 A. No.
24 Q. When it comes to advertising by cigarette
25 companies, is there a government agency that has
34769
1 oversight over advertising?
2 A. Yes. The Federal Trade Commission.
3 Q. And what does the Federal Trade Commission
4 cover in terms of its advertising responsibilities?
5 A. Well, it covers that there's no unfair or
6 deceptive advertising done by the cigarette
companies.
7 I mean, it also monitors the advertising
expenditures.
8 And promotional expenditure, the FTC also oversees
9 promotion.
10 Q. Was it the FTC that instigated the ban on
11 television advertising?
12 A. No. It was the Congress in conjunction
with
13 the companies.
14 Q. Now, in addition to the FTC, are there
15 voluntary industry codes to which Philip Morris and
16 other tobacco companies conform?
17 A. Yes, there are.
18 Q. And how long back or -- that's not a good
way
19 to put that.
20 How far back does the first of these
21 voluntary codes go.
22 A. The first I'm aware of is 1964, the year
23 after I joined the company, called the Cigarette
24 Advertising Code.
25 Q. Was that industry -- the Cigarette

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1 Advertising Code in 1964, that was in effect when
you
2 joined the company; that's what you just said?
3 A. No. I joined in '63. It was shortly
4 thereafter.
5 Q. The next year?
6 A. Yes.
7 Q. Did you become familiar with it when you
8 joined the company?
9 A. Oh, I lived with it because I was in
10 marketing, and it governed a lot of marketing
11 activities.
12 Q. Was the 1964 voluntary Industry
Advertising
13 Code maintained by Philip Morris as part of its
14 marketing practicing documents?
15 A. Oh, absolutely.
16 MR. HEIM: Your Honor, I'd offer -- this
is
17 Defendants' Exhibit 6100, and I'd offer that into
18 evidence.
19 MR. ROSENBLATT: What's that?
20 MR. HEIM: The industry code.
21 MR. ROSENBLATT: No objection.
22 THE COURT: Okay. Do you have a copy of
it
23 here?
24 MR. HEIM: Yes, Your Honor. It's in your
25 book and it's in the witness' book.

34771

1 (Defendants' Exhibit 6100 was admitted
into
2 evidence.)
3 BY MR. HEIM:
4 Q. Now, I want to ask you some questions
about
5 the voluntary code in 1964. I'm going to put it up,
6 but because I can't put it all up at once, it's two
or
7 three of these boards.
8 This was at a time before the ban on
9 television advertising, correct?
10 A. That is correct.
11 Q. And when -- how did it come to get
adopted,
12 do you know, Mr. Morgan?
13 A. Well, I sort of know the last stages of
it,
14 because I was with the company in the --
15 Q. Well, tell us the last stages of it.
16 A. The last stages are that cigarettes have
been
17 a controversial product, certainly during the entire
18 20th Century in the United States, and in fact, if
you
19 look at it closely, cigarettes have been
controversial
20 since the times of King James in England back in the
21 1400s or 1500s.
22 The cigarette industry is now and was then

23 under continuous attack for the nature of its
products
24 being a controversial product. And the cigarette
25 companies were very conscious, as I said, when I
joined
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1 the company. It was just accepted that you don't
2 market to nonsmokers or to kids. And I believe that
3 the Cigarette Advertising Code was an attempt to
codify
4 all those standards, put them in one place, and to
do
5 two things: One, since there were six cigarette
6 companies, to make an industry code so no one
company
7 sort of ran off and did it; all the companies agreed
to
8 do this. And then they got Governor Robert Meyner
of
9 New Jersey to be the administrator of it so that an
10 independent administrator would then administer it.
11 So it was not self-administered by the
12 companies, but it was administered by who was then a
13 major public servant in the United States.
14 Q. What do you mean by administer?
15 A. Make sure that the companies adhered. I
can
16 tell you that he did it because I lost a commercial
to
17 this code when I was a brand manager that he judged
to
18 be inappropriate.
19 Q. So you had an idea for a commercial --
20 A. No, I had a finished commercial. And
21 Governor Meyner was an individual and he sort of
made
22 his decisions on the fly. And the specific was,
when I
23 was brand manager on Parliament and it was running a
24 campaign called "London Discovers Parliament," so we
25 went over to London, England and did a play on words

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1 about: "Do you know America's Parliament?" to the
2 British people, us meaning our cigarettes; them
3 interpreting it as their house of government.
4 And he had approved the campaign, but we
5 had -- in the commercial we had British policemen,
the
6 bobbies on the street. I mean, they had nothing to
do
7 with the commercial except they were background.
And
8 Governor Meyner ruled that that was inappropriate;
that
9 those commercials should not have people in
positions
10 of authority in the commercials. And we had to
reedit
11 the commercial to get the bobbies out.
12 Q. Now, as you applied the code -- I mean,
this

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13 Cigarette Advertising Code covers a lot of things.
14 mean, it talks about, back when you could advertise
15 television or radio, the programs, it had to be
16 directed to people who were 21 years of age or
17 It talks about how or where cigarette advertising
18 cannot appear. It also covers some other areas
19 to do with models, correct?
20 A. Yes.
21 Q. Models in advertising?
22 A. That is correct.
23 Q. And what was the stricture or the
24 on models on advertising that came out of this?
25 A. That models both should be factually 25
1 of age or over, and should look 25 years of age or
2 over.
3 Q. Factually 25 and look it.
4 Factually 25 is something you can check
5 person's driver's license or birth certificate. How
6 did you make judgments, as you lived with this code
7 enforced, self-administered this code, how did you
8 judgments about models not looking under 25? How
9 you do that?
10 A. Well, I can be facetious and say if they
11 looked like me, because I was 25 at the time. What
12 did is make a judgment of whether they looked over
13 We eliminated some; we approved some. Every once in
14 while Governor Meyner or staff would argue with us.
15 was a matter of interpretation.
16 Q. So it was just a judgment call?
17 A. It was judgment.
18 Q. How did you enforce not giving sample
19 cigarettes to persons under 21 years of age?
20 A. You enforce that by when you hired
21 you had them sign forms that they understood they
22 weren't supposed to give samples to people under 21
23 years of age; also not supposed to give them to
24 nonsmokers.
25 You directed them to places that had
1 concentrations of people over 21; and you had, as
2 of your contract with the sampling services, that
3 management would check to make sure that these

people
4 were not giving cigarettes to people under 21.
5 Now, don't think for a minute that that
was a
6 fail safe, perfect, 100 percent system. It wasn't.
7 You're dealing in all this stuff with people. And I
8 remember some incidences where cigarettes were given
to
9 people under 21, and we terminated the sampler. So
it
10 does happen. The issue is trying to be as perfect
as
11 you can be, recognizing there's no perfect system.
12 Q. Back in 1964, was the legal age for
13 cigarettes 21 or was it 18?
14 A. It was -- in '64 the legal age was 18 in
some
15 of the states, 16 in a lot of the states, and no
legal
16 age in a large number of states. So 21 was
17 substantially above the minimum age.
18 Q. I think this is the end of the code. It
19 probably may be that we've already covered this, but
20 since I don't know, I'll put it up.
21 This part of the code, which is the e, f,
g
22 sections, again refers to being 25 years old, but
23 extends to fictitious persons as well and to
drawings.
24 Did that play a role in how the
advertising
25 campaigns for the brands other than Marlboro were
put
34776
1 together?
2 A. Well, it had a role in all the advertising
3 campaigns, because there are provisions on that
chart
4 that run through any ad. And it's -- you know,
that's
5 sort of the creative side of it, of trying to define
a
6 responsible position and acknowledging that we, as
the
7 cigarette companies, did not want to market our kids
8 to -- market our cigarettes to underage kids.
9 Q. Now, this code was in place from 1964
until
10 when?
11 A. Today.
12 Q. Has it been updated at any point?
13 A. I believe it was updated in 1990 to
include
14 promotional practices. And the provisions of that,
as
15 I remember, are just very much in line with this.
16 Q. Let me show it to you and ask you if you
can
17 identify it. 6102.
18 This is Defense Exhibit 6102. Have you
19 located that, Mr. Morgan?
20 A. I'm sorry.

21 Q. Defense Exhibit 6102, which is entitled:
22 Voluntary Cigarette Advertising and Promotion Code,
is
23 that what you were referring to when you said it
just
24 brought promotions in under advertising?
25 A. Well, it added promotions to advertising,
34777
1 yes.
2 Q. Is that code that you're looking at now,
was
3 that part of Philip Morris' marketing documents
after
4 1990?
5 A. What do you mean part of its documents?
6 Q. Is that a code that Philip Morris
maintained
7 in its records and followed and observed?
8 A. Absolutely. I mean, it's more than a
9 document; it's the principle and system under which
we
10 marketed.
11 Q. And that document that you have there is
the
12 one that is currently in effect today?
13 A. Yes. It's actually -- without it being an
14 industry code, Philip Morris on its own in recent
years
15 has added more to this.
16 Q. But that's the basic document?
17 A. It's the industry code.
18 Q. The industry code.
19 MR. HEIM: So I'll move its admission,
Your
20 Honor.
21 MR. ROSENBLATT: No objection.
22 THE COURT: All right. It will be
admitted.
23 THE CLERK: 6102.
24 (Defendants' Exhibit 6102 was admitted
into
25 evidence.)

34778
1 BY MR. HEIM:
2 Q. Part of these codes, Mr. Morgan, has been
to
3 regulate what kind of magazines the tobacco
companies
4 will place their advertising in and what kind of
5 magazines they will not; is that fair to say?
6 A. Yes. We talked about that before; that 20
7 percent of the circulation of a magazine -- the
8 circulation to people under 21 again, not 18. The
9 circulation to people under 21 must not be more than
20
10 percent. If it's more than 20 percent circulation
to
11 people under 21, a cigarette ad may not be in that
12 magazine.
13 Q. That's the voluntary code that the
companies

14 subscribe to?
15 A. Right.
16 Q. How do you know whether there's at least
80 percent of the purchasers of the magazine are over
the age of 21?
18 A. You know it because the magazines have
their circulation audited by an independent company called
21 Audit Bureau Circulation, ABC. And that is all
public information, validated by an independent source.
And it's done for all advertisers because all
advertisers want to know the demographics of circulation when
you buy a magazine.

34779

1 Q. I'm going to put up for demonstrative
2 purposes a bunch of magazines and ask you whether
these are advertising -- magazines in which Philip Morris
has advertised. This is Defense Exhibit 36880.
5 And I've displayed, 17 magazines.
6 A. I recognize those as magazines that
cigarette ads are in.
8 Q. Now, looking at these magazines with you
for a moment together, I guess intuitively you would
think that Better Homes and Gardens would easily have a
11 plus-80 percent, but I want to ask you about some of
12 the others that are on here.
13 And I guess the most, the one -- Sports
14 Illustrated. Have you, yourself, determined that
15 Sports Illustrated's subscriptions or purchasers are

--

16 fall with the 80 percent-plus over 21?
17 A. Have I myself determined that?
18 Q. Or people working for you?
19 A. People that are working for me. I mean,
it's a very simple statement. Every one of those
magazines has cigarette ads in them; therefore, every one of
22 those magazines has no more than 20 percent
circulation below the age of 21. Fact. It's just a fact.
24 Q. Rolling Stone, is that the name of that
25 magazine? You can barely read it. Rolling Stone

34780

1 magazine. That is a musical -- I mean, it appeals
to people who like music of some kind?
3 A. Right.
4 Q. If you want to call it that.
5 That magazine also has an 80 percent over

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cigarette
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6 A. I said if it has cigarette ads in it, it
7 80 percent or more circulation over 21. I mean,
8 there's nothing more I can say on it. There are a
9 number of magazines that cigarette ads don't go in,
10 there are some magazines that don't accept cigarette
11 ads, and there are other magazines that the
12 industry will not advertise in because it doesn't
13 those circulation standards.
14 Q. Are those circulations checked
15 from time to time to insure that they maintain that
16 standard?
17 A. I believe the Audit Bureau Circulation
18 demographic data reports like every six months.
19 Q. I want to turn to another topic with you,
20 which is the subject of Philip Morris trademarks and
21 the area of youth smoking.
22 First of all, Philip Morris owns the
23 to the name Marlboro?
24 A. It owns it everywhere in the world but
25 Canada.

1 Q. Well, tell me. Why doesn't it own it in
2 Canada?
3 A. Everything has a story. This one is not
4 important.
5 Short story. In 1917, the tobacco trust,
6 during the period when like the oil companies were
7 busted and everything else, there was a tobacco
8 cartel. It was busted up. The trademarks got
9 by company and there were some anomalies. The most
10 pronounced one was Benson & Hedges. These companies
11 own Benson & Hedges. Philip Morris owns Marlboro
12 everywhere but Canada.
13 Q. Now, in your experience and over the
14 you've had occasion to stop others from using the
15 Marlboro name in connection with products that
16 to children?
17 A. Yes.
18 Q. And can you give the jury an example of an
19 instance where a company wanted to use or did use,
20 use the name Marlboro, and Philip Morris stopped
21 from occurring?
22 A. Most recently several years ago, 1993 or
23 Sega, the maker of video games, used a Marlboro sign
24 a Sega video game. And we stopped them.
25 Q. And now does the company get requests from

34782

1 time to time to actually say, you know, "We'll pay
you
2 something and let us use your brand name," on any
3 particular other kind of product?
4 A. Well, Marlboro is a very prominent and
5 valuable trademark. There are a lot of requests
like
6 that.
7 Q. Let me show you one such request, or let
me
8 show you one document for a minute.
9 6113.
10 Let me ask you first --
11 A. Excuse me. You said 61 --
12 Q. 13.
13 A. Okay.
14 Q. I've shown you a letter dated November
22nd,
15 1989 to Philip Morris. And my question to you,
first,
16 Mr. Morgan, is: Is this correspondence maintained
in
17 the ordinary course of business by Philip Morris?
18 A. Yes.
19 Q. And this is part of the business records
of
20 the company?
21 A. Yes.
22 MR. HEIM: All right. I'd move its
23 admission, Your Honor.
24 THE COURT: This is not the same as we had
25 the other day?

34783

1 MR. HEIM: No. We already moved that one.
2 That one is already in.
3 THE COURT: All right.
4 Objection?
5 MR. ROSENBLATT: No, Your Honor.
6 THE COURT: All right. Admitted.
7 (Defendants' Exhibit 6113 was admitted
into
8 evidence.)
9 BY MR. HEIM:
10 Q. Let me read this to you, Mr. Morgan,
because
11 I don't have a blow-up of it. This is dated
November
12 22nd, 1989, and it's written by Doreen Baker,
manager
13 of Marlboro Auto Sports, to Don Miller,
vice-president
14 and general manager, Motor Sports International in
St.
15 Peters, Missouri.
16 Dear Don: Leo asked me to review our
17 participation with the Tyro remote control car with
the
18 legal department. Unfortunately, we cannot
authorize
19 its production of a Marlboro car because of our
policy

remote 20 to market to the 21 and above age consumer. The
21 car has the ability to appeal to various age groups,
22 and in fact, states on the box ages 8 and above.
Thank
23 you for giving us the opportunity to review this
24 proposal.
25 Now, is this an instance of the company --
by

34784

1 the way, do you know Doreen Baker?
2 A. Yes.
3 Q. You do know her?
4 A. I know who she was, yes.
5 Q. Does this reflect Philip Morris' policy
6 generally with respect to use of its name on a
product
7 that might appeal to a young underage smoker?
8 A. It reflects that specifically and it
reflects
9 the general thing I've been saying, which is Philip
10 Morris is very conscious of and took all steps to
avoid
11 marketing to people under the legal age.
12 Q. Would you turn to Defendants' Exhibit
6117,
13 which is already in evidence?
14 Now, would you take a minute and just kind
of
15 quickly take a look at this?
16 A. I did.
17 Q. This is a letter from -- written on
Marlboro
18 stationery from Nicholas von Moltke, program
19 administer, Marlboro Racing, to a Mr. Robert Good,
20 Waterloo Regional Kart Club, 65 Karen Walk,
Waterloo,
21 Ontario in Canada.
22 This letter -- this would not have to do
with
23 advertising, correct; this has to do with a
24 sponsorship?
25 A. I read it that way. Someone wrote in
asking

34785

1 Philip Morris to consider sponsoring a race at their
2 cart club.
3 Q. So somebody wrote in and the letter reads:
4 Dear Mr. Good: Thank you for the information you
sent
5 us on the activities of the Waterloo Regional Kart
6 Club. We applaud the work you are doing teaching
young
7 people the rules of safe and responsible racing.
8 Philip Morris is a major supporter of professional
auto
9 racing: Emerson Fittipaldi's 1989 Indy 500-Winning
PC
10 18 was sponsored by Marlboro. Despite our active
11 interest in professional racing, we will not be able
to

12 participate in any Kart Club events. As a cigarette
13 manufacturer, Philip Morris voluntarily abstains
from
14 sponsoring any sports or cultural activities that
15 involve the participation of minors. We appreciate
you
16 thinking of Philip Morris, however, and we wish you
the
17 best of luck with your 1990 racing season.
18 Do you know Nicholas von Moltke?
19 A. I know who he was.
20 Q. Again, is this another implementation of
the
21 company's voluntary commitment to not endorsing
22 underage activities?
23 A. Don't hold me exactly to the number, but
that
24 letter would be representative of maybe 100
instances a
25 year where people wrote in, and for one reason or
34786
1 another they were turned down relating to just the
fact
2 that it involved minors.
3 I mean, I think of one you didn't share
that
4 I made a decision on which was on clothing offers,
on
5 Marlboro miles in those catalogs. We eliminated
small
6 sizes because it had the appearance of appealing to
7 kids. Even though you had to be 21 to participate,
we
8 said no small sizes, which in a way was
discriminating
9 against small adults, but, again, when you live in
this
10 industry, Mr. Heim, and you're attacked the way you
are
11 and the allegations are made, you really do try and
12 act, you know, beyond -- you put buffer zones in on
13 everything, so that, for example, you have to be 21
to
14 participate in the promotion, even though the legal
age
15 to purchase cigarettes is 18.
16 Q. Now, you said that you put buffer zones
and
17 things. You testified earlier that Philip Morris
and
18 the other cigarette companies don't sell directly to
19 consumers; they sell through retailers. So there
are
20 only a certain amount of things that you can
control,
21 correct?
22 A. That's correct.
23 Q. And you talked about the use of over-25
24 models in ad placements?
25 A. Right. You control media where you say
you

34787

1 measure against 21 and not 18. You run your
promotions 2 on the basis of 21, not 18. Sponsorships we just
saw, 3 21 not 18, even though 18 is the legal age. But the
4 one place we have no control is what happens at
retail, 5 the sale of cigarettes.
6 Q. Which is access by minors to cigarettes at
7 the retail stores?
8 A. Correct.
9 Q. Does the company try to do anything and
has 10 it historically tried to do anything to work on that
11 area, you know, the access by minors to retail
outlets 12 and cigarettes?
13 A. It has -- again, understanding we can't
order 14 anybody, we've sponsored programs like "It's the
law," 15 or "We card," which says, signs on the door, "We'll
16 card you."
17 We produced calendars for retailers to use
to 18 say: If you were born before this day or after this
19 day, we won't sell you cigarettes.
20 The sales force has programs that reward
21 retailers who are not convicted by states or
22 municipalities for selling cigarettes to minors, and
23 programs that penalize retailers in terms of the
24 merchandising payments we do make to them for the
25 display.

34788

1 We will penalize retailers who are
actually 2 convicted of selling cigarettes to minors. Within
the 3 scope of not being able to dictate or control, we do
4 encourage them to obey state laws, because
ultimately 5 we're getting really hurt by this underage
phenomenon. 6
7 Q. When you say you reward retailers who
don't 8 get sanctioned by the state or cited by the state
for 9 underage smoking and you punish or penalize the ones
10 that do, are you talking about financial?
11 A. Purely financial.
12 Q. You've been with the company from, what,
'63. 13 I want to take you back before 1963 and show you a
14 document that is in evidence, which is Defense
Exhibit 15 3267. It's in your book, but I have it blown up
here. 16
17 This goes back to 1936. 1936 document.
18 This is a document where M.H. (sic) Green
--
19 do you have any idea who M.H. Green was back in 1936

18 with Philip Morris?
19 A. I do not.
20 Q. And he's writing to a Mr. Edward Weitzen,
May
21 28th, and he starts out: Your work is to start now
22 within a few days. Let me caution you once more
23 against giving samples to minors.
24 Now, has this policy of trying to avoid
25 minors and underage smoking, whether by sampling, by

34789
back
1 advertising, by promotion, that's evidenced, noted
2 in 1936, has this been part of the way Philip Morris
3 has conducted itself for as long as you know it?
4 A. That would suggest that it dates back to
'36.
5 I can only speak to '63 when I joined the company.
But
6 I think I said earlier, the unwillingness to market
to
7 nonsmokers and to minors is something I inherited,
was
8 part of the culture when I walked in the door there.
9 It was taken for granted: That's the way you
operated.
10 You just didn't do that.
11 Q. And has that been the way you've operated?
12 A. That has been the way we've operated.
Again,
13 there have been instances where we were not perfect.
14 There have been -- you have a sampling chart up. I
15 can't tell you what year or what exactly. I know
that
16 we've gotten some complaints from a mother that her
17 child got cigarettes; I know that.
18 But if you're talking about what the
intent
19 of the company is, what its strategies are, what its
20 stated executorial desires are, and you allow it to
be
21 even just slightly human in execution, this is a
22 company that has clearly stated what its willing to
do
23 and not do, and it's done it.
24 MR. HEIM: That's all I have, Your Honor.
25 Thank you.

34790
point.
1 THE COURT: We'll take a break at this
2 Come back 10 minutes or so.
3 (The jurors exited the courtroom.)
4 (A brief recess was taken.)
5 THE COURT: All right. Let's get the jury
6 out, please.
7 MR. HEIM: Judge, I want to correct -- I
made
8 reference to an incorrect exhibit number, and I
should
9 correct it for the record. Probably Olga has spent
the
10 whole time here looking for it. I said 3267. It

is,
11 in fact, 3118. That's the number under which it was
12 admitted yesterday.
13 THE BAILIFF: Bringing in the jury.
14 (The jurors entered the courtroom.)
15 THE COURT: All right. Have a seat,
folks.
16 Yes, sir. We'll start on cross.
17 CROSS EXAMINATION
18 BY MR. ROSENBLATT:
19 Q. Good afternoon, ladies and gentlemen.
20 Good afternoon, Mr. Morgan.
21 A. Mr. Rosenblatt, hello, again.
22 Q. You were the president and CEO of Philip
23 Morris, Inc., the domestic company, from December of
24 1994 to November 1st, 1997, right?
25 A. Yes.

34791
the
1 Q. Philip Morris has had a lot of CEOs over
2 years, haven't they, at least in recent years? Was
3 Campbell your predecessor?
4 A. Bill Campbell was my predecessor.
5 Q. You replaced him?
6 A. Yes.
7 Q. And you've been replaced by who?
8 A. Michael Szymanczyk.
9 Q. And he is presently both the president and
10 CEO of Philip Morris domestic?
11 A. I know he's the president -- I believe he
is.
12 I didn't pay much attention to it. He's the
president
13 and I believe he's the CEO, too.
14 Q. Now, to put your career in some focus, you
15 said -- actually, Philip Morris was the first
full-time
16 job you held after college; you went directly from
17 college to Philip Morris?
18 A. That's correct.
19 Q. In 1963?
20 A. Yes.
21 Q. You were at Philip Morris in a variety of
22 positions. And as I understand it, you voluntarily
23 decided to leave in 1983 to go with a video maker,
24 Atari?
25 A. I was recruited from Philip Morris and I

34792
1 joined Atari, yes.
2 Q. You went from one very high-paying job to
3 another high-paying job?
4 A. Actually, I went from a low-paying job to
a
5 very high-paying job at Atari.
6 Q. And you were away from Philip Morris for
7 about five years?
8 A. Correct.
9 Q. You returned to Philip Morris in 1988, but
10 when you returned to Philip Morris, you were not
11 involved in marketing domestic cigarettes; you were
12 doing different things?

13 A. Correct.
14 Q. You were with the international company.
15 What is that called, Philip Morris Companies?
16 A. I was not with the international company.
17 Q. Which company were you with?
18 A. I was with Philip Morris Companies Inc.,
19 which is the parent corporate firm.
20 Q. And doing what for them?
21 A. I was doing marketing strategy planning
22 across all the businesses. Synergy work actually
was
23 what I was doing.
24 Q. And then, as I understand your testimony,
25 when you came back to Philip Morris for a period of

34793

1 time, you were with Kraft Foods?
2 A. Yes, sir.
3 Q. And for a period of time you were with
Miller
4 Beer?
5 A. Technical point. I actually transferred
to
6 the Kraft business. When I was working on Miller, I
7 was still in corporate and being more of an internal
8 consultant. So I never transferred over to the
Miller
9 Brewing, as I had to Kraft.
10 Q. Marketing. Marketing is putting your best
11 foot forward to sell your product. And whether
you're
12 selling cheese or beer or Marlboros, the bottom line
is
13 sell as much as you can to as many people as you
can.
14 I know tobacco has an exception: You
don't
15 want to sell to kids. But excluding that.
16 A. No, I was actually thinking of something
17 else. You never know in these kinds of discussions

--

18 Q. This is not a discussion; this is a
19 question/answer.
20 A. A question/answer. Excuse me.
21 What you said is not literally correct.
But
22 I don't know that it's sufficiently unliterally
correct
23 to engage in a dialogue about it. Marketing is not
24 simply selling the most number of product to the
most
25 number of people, because there's an element called

34794

1 profitable. There are many, many marketing
situations
2 where you choose not to sell the most of a product
to
3 the most number of people because it's not
profitable.
4 For the stockholders you can make more money selling
5 less product to less people.
6 Q. At a better price?

7 A. At a better price.
8 Q. Okay.
9 A. So it's just -- it's too broad of a
10 generalization.
11 Q. Then the bottom line of marketing is to be
as
12 profitable as you can?
13 A. That's not just -- that may be the bottom
14 line of a company or finance, but marketers usually
15 want to spend more money. I would say the bottom
line
16 of marketing is to be successful in selling your
17 product in an appropriate manner for the interests
of
18 the company.
19 Q. A marketer, a marketer doesn't become the
20 president and CEO of the entire company unless he's
21 very good at marketing, unless he's a hell of a
22 salesman, correct?
23 A. I disagree with that. The chairman of the
24 Philip Morris Companies was a marketer and was
fairly
25 well criticized publicly for not being a good
salesman.

34795

1 He was a great business strategist.
2 Q. This is Geoffrey Bible?
3 A. No. This is Michael Miles.
4 Q. Who is no longer with the company?
5 A. That is correct. Geoffrey Bible was an
6 accountant. He was not a marketer.
7 Q. Now, I'm looking at the two packages of
8 Marlboros that you discussed with Mr. Heim. The
9 Marlboro Red, and this is the flip-top box, most
10 people -- you're right. It was interesting. Most
11 people, I think, would not be aware that the
flip-top
12 box has been around since '55, like 44 years.
13 And the white pack is Marlboro Lights?
14 A. Correct.
15 Q. Now, I notice there are several things
that
16 are consistent on both packs, but it says on each
pack:
17 "5 miles." My understanding of this is people buy
the
18 packs, they save the packs, they total up their
miles,
19 and then when they have enough miles and they see a
cap
20 or a shirt or rain gear or whatever that they want,
21 they can send in the miles to get the product?
22 A. Yes, sir.
23 Q. And this of course is what it's tied to,
the
24 new gear catalog?
25 A. That would have been one of the catalogs
of a

34796

1 series, yes.
2 Q. I'll give you this in a minute, but just

3 looking at the first page, for example, there's a
 4 jacket, a brown jacket, which you can get for 1,795
 5 miles. So if each of these packs is 5 miles, would
 you
 6 need -- a person would need to buy quite a few packs
 to
 7 get up to 1,795 miles to get the free jacket?
 8 A. Yes. 300 some odd packs.
 9 Q. There's no way for you, or anyone at
 Philip
 10 Morris, to know how many nonsmoking people sat
 around
 11 with a friend or a buddy or somehow got possession
 of
 12 this catalog and said to themselves: Boy, there's
 some
 13 things in here I'd really love to have, and the only
 14 way to get them is to buy Marlboros.
 15 So for all you know, this promotional
 16 campaign, the miles connected to Marlboro gear, may
 17 very well have stimulated a nonsmoker to become a
 18 smoker to get some of this gear?
 19 A. Well, it's hard for me to believe, first
 of
 20 all, that someone would start smoking for that; and
 21 secondly, if you had to buy 350 packs to get a
 jacket,
 22 you'd be spending \$700 for cigarettes you didn't
 want
 23 to get a hundred dollar jacket. It just doesn't
 make
 24 sense.
 25 Q. Not if after the first three or four packs
 34797
 1 you really liked it and become a regular smoker,
 which
 2 would be good news for the stockholders and the
 board,
 3 because from a stockholder standpoint, the more
 people
 4 that are buying the product and smoking the product,
 5 that's good news for stockholders, right?
 6 A. Not necessarily. Depends how you manage
 your
 7 budgets.
 8 Q. Here's a pair of shorts for 200 miles.
 Why
 9 don't you just look through this and see if that's a
 10 fair representation, a fair pictorial representation
 of
 11 the varied merchandise items that Philip Morris uses
 in
 12 connection with this promotional --
 13 A. I know it is. I was involved with it.
 14 Q. So you're very familiar with this?
 15 A. Yes.
 16 Q. Now, this particular ad on the back,
 17 "Adventure Team Marlboro. Get the miles. Get the
 18 gear," have you ever used -- when I say you, I mean
 19 Philip Morris -- has Philip Morris ever used this ad
 in
 20 magazines unconnected with this booklet?

21 A. I can't answer that question. Philip
Morris
22 would have advertised this promotion. Whether that
23 particular back page that you're showing, the
graphics
24 were the actual ad that was used, I don't remember.
I
25 just don't know.

34798

1 Q. Then there's a gear order form. I just
want
2 to go through a couple of the items. There are
3 jackets, there are field glasses, sunglasses, long
4 shorts, the cave tent, a whole variety of items.
For
5 example, it says for the zero bag you need 270
packs.
6 What is the zero bag?
7 A. That's a sleeping bag, I believe.
8 Q. That's a sleeping bag.
9 And then for a team cap lizard rock, 23
packs
10 of cigarettes.
11 A. If that's what it says.
12 Q. Yes, that's what it says.
13 Then I'm sure you're familiar with this
page.
14 It says: "Get the gear with this," and this is, I
15 don't know, is that an order form where the person
puts
16 down their name, their address?
17 A. It's the back of the order form. That's
the
18 order form, and that's where the name and address
goes.
19 Q. Okay. "Get the gear with this. Fill out
the
20 information below."
21 Now, it says -- and it has room for the
22 person to give their name, their home telephone
number,
23 their address, zip code, previous brand smoked,
current
24 brand. And then it says, "By participating in this
25 offer and signing below, I certify that I am a

34799

1 cigarette smoker 21 years of age or older. I am
also
2 willing to receive free samples of cigarettes and
3 incentive items in the mail subject to applicable
state
4 and federal law."
5 Now, how often would that be done, where
you
6 would send free samples of cigarette and incentive
7 items to people in your database?
8 A. Occasionally. No longer, because Philip
9 Morris has stopped sending any cigarettes through
the
10 mail in 1976, I guess it was.
11 Q. But this is way more recent than --

just 12 A. Look at the date on it. It's 1994. You
13 showed it to me.
14 Q. Right.
15 A. I said since 1996.
16 Q. You may have misspoke. You said '76.
17 A. My fault. Since 1996.
18 Q. But up until it was stopped in '96, Philip
19 Morris, obviously a couple of times a year, would
send 20 free samples to people in their database?
21 A. It was not a big effort, a big program.
It 22 would most commonly be to competitive smokers, where
23 you would send two coupons for Marlboro at 50 cents
off 24 a pack, and you'd send that to Winston smokers.
25 Q. How many names do you figure there are in
the

34800

1 Philip Morris database identifying smokers?
2 A. When I left there were 25 million
qualified 3 names.
4 Q. And how do you go about identifying
5 competitive smokers?
6 A. You ask what brand you smoke.
7 Q. If they fill out this form?
8 A. Or any form. Fill out a postcard. The
sales 9 force sees consumers at retail. You always ask name
10 and address, what brand do you smoke regularly, and
11 then are you over 21 and are you willing to receive
12 cigarette promotional literature.
13 Q. And I would certainly assume that in the
14 computer database, are those kept separate, the
15 competitive smokers from the Philip Morris smokers?
In 16 other words, you've got a list of Virginia Slims
17 people, got a list of Marlboro people?
18 A. I don't know if they're kept separate, but
if 19 you want to cull it up that way, you surely can.
20 Q. Did I understand you to say -- I didn't
know 21 if you were making a distinction between the various
22 cases in which you've testified, where you've
testified 23 in court in front of a jury and given depositions.
Let 24 me just try to separate those.
25 A. Sure.

34801

1 Q. I took your deposition about two years ago
in 2 New York City. That's when you and I met for the
first 3 time?
4 A. That's my first deposition, actually.
5 Q. I'm glad I had the privilege of breaking
you

6 in.
7 A. You christianed me. Like a broncho.
8 Q. How many trials have you actually
testified
9 in?
10 A. This is my fourth.
11 Q. How many depositions do you figure you've
12 given?
13 A. I think -- I think six.
14 Q. When you retired in 1997, part of your
15 package is that you're going to get \$650,000 a year
for
16 the rest of your life?
17 A. No, that's not correct.
18 Q. What's correct?
19 A. 637,000.
20 Q. You want to quibble?
21 A. No, but I don't want to say -- I don't
want
22 to perjury myself in agreeing to something that's
not
23 correct.
24 Q. And if you live to be 120, you'll get it
25 until you're 120?

34802
1 A. Unfortunately, I'm going sort of through
that
2 right now. That's not the way it works. And
there's a
3 little dice rolling that goes on in a retirement
that I
4 wasn't aware, which is you can elect to either take
it
5 lump sum now with the present value, or you can take
6 it, that amount, annually for as long as you live.
7 So, you sit there and you say, "Hmm, a lot
of
8 money lump sum now, present value. Or am I going to
9 live to a ripe old age?" So you're making a big
bet.
10 So the answer is no, I'm not necessarily going to
get
11 it if I live to 106.
12 Q. We should all be faced with that tough
13 choice.
14 A. I'm very fortunate.
15 Q. Yes, you are.
16 You haven't decided?
17 A. I have not decided. Depends what my body
18 temperature is whenever I think about it.
19 Q. Well, I put quotes around something you
said
20 to Mr. Heim very early in your testimony: "I'm a
21 normal retiree." You're obviously the opposite of a
22 normal retiree?
23 A. Am I?
24 Q. Pardon?
25 A. I don't know that.

34803
1 Q. You think a normal retiree is getting
2 \$637,000 a year guaranteed for life? Do you think

3 that's normal or unusual?
4 A. No, but the life I lead is a normal life.
I
5 live on a small farm and I don't use the money I
get.
6 Q. You said, "I'm a normal retiree," and I'm
7 simply pointing out that at \$637,000 a year, will
you
8 or will you not agree that you're not a normal
retiree?
9 A. Financially I'm not a normal retiree.
10 Q. Financially you're not, right.
11 And as a matter of fact, part of your
package
12 is you get health insurance, you get life insurance
for
13 the rest of your life?
14 A. Yes. Standard stuff --
15 Q. Standard --
16 A. -- for a large corporation.
17 Q. Standard stuff for people at your level,
not
18 standard stuff for the man or woman working on the
19 assembly line producing cigarettes in Richmond?
20 A. I'm not sure that they don't get the
medical
21 coverage. I'm not sure about the life insurance. I
22 believe they do get the medical coverage.
23 Q. They do not get the annual incentive
awards
24 which can be equal to 125 percent of your salary?
25 A. No, but they do get incentive awards, but
not
34804
1 at that level.
2 Q. And as a matter of fact, another part of
the
3 financial package with you is that, for example,
when
4 you're away from home and you've agreed to testify
in
5 these cases, Philip Morris has agreed to maintain
your
6 home security?
7 A. That is correct. I said that at a trial.
8 That was one of the things that I said to Philip
9 Morris, "If I'm going to testify" -- they had put
the
10 security system in as part of -- it's what
executives
11 at Philip Morris get, and I asked them to maintain
it
12 if I were testifying, that is correct.
13 Q. You have the right to exercise your option
on
14 600,000 shares of Philip Morris stock, right?
15 A. Yes, I do.
16 Q. If Philip Morris goes up, you know, a
dollar
17 or 3 dollars or 5 dollars, that's good financial
news
18 for you, isn't it?

19 A. It's good financial news, yes.
20 Q. Part of your agreement is you get
financial
21 counseling for tax advice?
22 A. That ends this year.
23 Q. And in the year 2001, which is just around
24 the corner, you have an option on 160,000 additional
25 shares?

34805

1 A. No, that's not correct.
2 Q. I mean, am I off by a little or I'll -- I
3 didn't pluck that out of thin air.
4 A. There's an option that vests 20 percent of
5 the stock each year. It's 80 percent vested now.
So
6 in the year 2001, it's just the last 20 percent of
that
7 option.
8 Q. So overall, in addition to the 600,000
shares
9 you have now to exercise an option on, how many
10 additional shares will you have to exercise an
option
11 on?
12 A. I think where you're leading is how many
13 shares of Philip Morris stock do I have access to
14 through options or whatever.
15 Q. You're absolutely correct.
16 A. The answer is 800,000 in total. Assuming
I'm
17 alive for another year.
18 Q. What's the value of 800,000 shares of
Philip
19 Morris today?
20 A. What do you mean by the value?
21 Q. What they're selling for.
22 A. Well, the stock is selling for 39. So the
23 face value of 40 times 800,000 would be \$32 million,
if
24 you bought them at zero.
25 Q. Well, you don't actually pay for the stock

34806

1 until you exercise the option, so it's a no-lose
2 situation?
3 A. If the stock is above the exercised price,
4 which actually some of my shares right now are not
5 above the exercise price. At 39, almost half of
those
6 800,000 shares are worthless right now, because the
7 option price at which I can buy them is above the
8 current market price.
9 Q. In advertising terms, and in marketing
terms,
10 what percentage of people do you think, if they saw
the
11 cowboys on any one of these blow-ups that you
discussed
12 with Mr. Heim, and the word "Marlboro" did not
appear,
13 and there was no pack of cigarettes in the ad, and
14 there was no warning in the ad, what percentage of

15 Americans driving by on a highway seeing the
billboard
16 would say: That's Marlboro?
17 A. I guess -- you're asking me to guess. I'd
18 say 35 to 40 percent.
19 Q. That's all?
20 A. Yes.
21 Q. Well, that's an incredible percentage in
22 advertising and marketing terms, isn't it?
23 A. That's a very high percentage.
24 Q. And I think, as I've understood you to
say,
25 that's why consistency over the years has been such
a

34807

1 blessing to the Marlboro brand, because it is so
2 incredibly recognizable?
3 A. That is true.
4 Q. Can you think of any other product that
has
5 the name recognition and the recognizability of an
6 advertising format as does Marlboro?
7 A. I can think of some that are in the same
8 league. Don't hold me to -- more or less, I think
9 McDonald's is there. I think the Coke bottle is
there.
10 For many years Levi's was there, although Levi's has
so
11 diffused their image that I'm not sure anymore. And
12 certainly Volkswagen a number of years ago was there
13 with the Beetle. Is that the Beetle? Bug?
Whatever
14 it was called.
15 Q. In what year did Marlboro become the
number
16 one selling cigarette in the world?
17 A. In the world?
18 Q. Yes. Okay. In America. Make it simpler.
19 A. I think 1978. I think.
20 Q. Where was it, let's say, in the '60s?
21 A. Fifth, 6th, 7th, 8th, 9th, 10th,
depending.
22 It grew -- in the '60s through '78 it would grow in
23 rank on a regular basis.
24 Q. Your best recollection is that in 1978, 21
25 years ago, Marlboro became the number one selling

34808

1 brand?
2 A. That's my best recollection, yes.
3 Q. Which cigarette did it replace, do you
4 remember?
5 A. Winston.
6 Q. How long had Winston been number one?
7 A. Maybe about 10 years.
8 Q. And did Winston -- you know, I think of
9 Winston, and you and I remember the television shows
10 and the commercials Winston -- very annoying
11 commercial, but apparently it worked, "Winston
tastes
12 good like a cigarette should," over and over and
over

13 again. Were they consistent with that over the
years?
14 A. They were. And they started losing market
15 share when the broadcast ban came and they lost that
16 television commercial, and they couldn't translate
the
17 television commercial that you remember, did not
18 translate well into print, because it was a sound
idea.
19 Right. You just said it. It was a jingle. And it
was
20 a jingle and it didn't translate into print and they
21 lost their competitive edge.
22 Q. So as a marketer, you attribute the fact
that
23 Winston lost its number one position to the fact
that
24 it could no longer advertise on television the
jingle,
25 "Winston tastes good like a cigarette should," and

34809

1 that's the primary reason --
2 A. No. I think the primary reason was that
3 Marlboro was a better product and tested that way.
4 Better tasting product.
5 Q. During the 10 years, you know,
approximately,
6 that Winston was number one, what product was number
7 two or three?
8 A. Well, you see, when Marlboro became number
9 one, it was number one because it was growing.
Winston
10 didn't become number one because it was growing, as
11 much as it was in second place; and Pall Mall, a
12 nonfilter, slid under it.
13 Remember, during this period of time, you
had
14 Camels and Lucky Strikes and Pall Mall, which were
the
15 three biggest brands in the industry going back even
16 further. And they're all losing market share as the
17 filters are growing. And in the case of Winston, as
I
18 remember, it wasn't so much that it was growing to
19 number one, but holding in at number two, and Pall
Mall
20 came below it. So Winston became number one by
default
21 in that sense. I mean statistically by default.
22 Q. I'm trying to understand the gap. When
23 Winston was number one, what was the gap between it
and
24 the number two or three?
25 A. I do not know.

34810

1 Q. Now, once Marlboro became number one, it
has
2 maintained that position right up until today,
correct?
3 A. Yes, it has.
4 Q. And is it not unique in the cigarette

5 business that the spread between Marlboro's share of
6 the market and the number two product share of the
7 market is as wide as it is and has been as wide as
it
8 is for so many years?
9 A. Well, it's unique in this sense: Camel, I
10 think -- in fact, we may have seen it in a document
11 this morning. That Marlboro plan referenced it, I
12 think, although we didn't talk about it. Camel had
a
13 31 share at one point. The nonfiltered Camel, not
14 current Camel.
15 There were fewer brands in the industry
then.
16 There were only like 10 brands, so the leading brand
17 would not have -- would have sort of stronger
18 competition with higher market shares. There are
like
19 120 brands in the industry right now, and therefore,
20 their slice of the nonMarlboro part of the industry
21 gets divided up smaller.
22 Long way of saying, yes, sir, you're
right.
23 Marlboro's lead over the number two, I don't believe
--
24 I believe is greater than a number one brand has had
25 over number two in the past.

34811

1 Q. Marlboro has, what, about a third of the
2 market, 33 and one-third percent?
3 A. I think I just read in the annual report
that
4 it's up to 35 actually.
5 Q. And what's number two?
6 A. Number two is Newport.
7 Q. With what, 5 percent?
8 A. Little lower than that.
9 Q. So that's an incredible spread, 35 percent
to
10 5 percent?
11 A. Yes, it is. As I said, I think you asked
the
12 question before. I believe historically that's a
wider
13 spread -- 30 point spread is a wider spread than has
14 existed before.
15 Q. Would you agree that advertising is a very
16 powerful and persuasive medium?
17 A. No.
18 Q. Let me give you an example of what I
consider
19 to be a clear demonstration of its incredible power.
20 And if you disagree with me, which I'm sure you
will,
21 you'll explain why.
22 Almost no men smokers, almost zero smoke
23 Virginia Slims, right?
24 A. Wrong.
25 Q. Well, I'll find where you said something
very

34812

1 similar to that.
2 A. But in Korea --
3 Q. No. In America. I'm talking America.
4 A. Because Korea, it's a man's brand.
5 Q. I'm talking America.
6 A. In America, almost no men smokers smoke
7 Virginia Slims, correct.
8 Q. Because it has been so identified as a
9 woman's cigarette, that the average man would be
10 embarrassed and made to feel effeminate if he took
out
11 a pack of Virginia Slims and started smoking, and
12 that's all advertising?
13 A. No, it's not all advertising.
14 Q. What is it?
15 A. Sponsorship for 25 years of the Virginia
16 Slims Women's Tennis Circuit. Event sponsorship; a
17 cigarette that is physically slim and longer; it is
a
18 feminine-shaped cigarette; a package with pastel
colors
19 on it; promotions that offer pink umbrellas and fur
20 collars and purses and compacts and lipstick.
21 Q. There are guys like that in South Beach,
but
22 they ain't smoking Virginia Slims?
23 A. I think you just circled your argument.
24 Q. But they're not smoking Virginia Slims,
even
25 those guys?

34813

1 A. How do you know that?
2 Q. Because I go down there occasionally --
3 A. Your Honor --
4 Q. -- for a long walk.
5 THE WITNESS: Protect me, Your Honor.
6 THE COURT: All right. The fun is over.
7 A. (Continuing) You're right. Men don't
smoke
8 Virginia Slims. My point is that you started by
saying
9 advertising is all powerful. And I'm saying no,
it's
10 not. Advertising is part of the marketing mix of a
11 brand's presentation, and the little game we just
went
12 through demonstrated that; that the perception of
what
13 Virginia Slims is comes from the product, the
14 advertising, the promotion, the packaging, the event
15 sponsorship. It comes from building that brand
equity
16 I talked about this morning.
17 Q. First of all, I don't believe I said that
18 advertising is all powerful. I said, "Would you
agree
19 with me that it's a very powerful medium?" But be
20 that --
21 A. No, I think --
22 Q. I said what I said. The record will
reflect
23 what I said.

24 But would you agree that advertising of
25 Virginia Slims over the years is a significant
factor,
34814
1 not the only factor, a significant factor in the
reason
2 why American men do not smoke Virginia Slims?
3 A. Yes, sir.
4 Q. How long has Virginia Slims used the
slogan:
5 "A woman thing"?
6 A. Don't hold me specifically. Six, seven
7 years.
8 Q. Do you anticipate that that will be
continued
9 as the "Come to Marlboro Country"?
10 A. I have no idea because I'm not involved
11 anymore.
12 Q. Mr. Heim asked you about, and you
testified
13 at some length, about the history of Marlboro. It
was
14 a woman's brand. I'm not going to go back to 1910
and
15 1920 -- well, even in the '20s it was a woman's
brand
16 and it was very unsuccessful?
17 A. Very.
18 Q. Wasn't going anywhere?
19 A. Nowhere.
20 Q. Even the women didn't like it?
21 A. Correct. As I said, the ivory tip and the
22 beauty tip were not compelling ideas.
23 Q. When the Marlboro -- when the Philip
Morris
24 advertisers and marketers decided to start using the
25 cowboy motif in about 1954, '55 --
34815
1 A. No.
2 Q. What year?
3 A. 1963.
4 Q. Well, we had testimony I think from a
5 Dr. Semenik in advertising, an advertising expert,
and
6 a board was put up. My understanding is "Come to
7 Marlboro Country" began in '63, but they started
using
8 cowboys in the advertising in '54 or '55?
9 A. Let me tell you the facts, okay? The fact
is
10 that the original Marlboro advertising in '54, if
you
11 will, the repositioned Marlboro from the woman's
12 cigarette to the man's cigarette, used men with
13 tattoos, and the first of those was a cowboy, one
14 cowboy. But they also showed a whole bunch of
15 different men with tattoos. Where people get
confused
16 is, yes, the first Marlboro ad was a cowboy with
17 tattoos, but they didn't use the "Come to Marlboro
18 Country" until 1963. There were different campaigns

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19 between: Julia London. There were just a whole
20 of different pieces of advertising.
21 Q. So the breakthrough, according to you,
22 with "Come to Marlboro Country" in 1963; that was
23 start of the steady rise in Marlboro sales?
24 A. Yes, sir.
25 Q. Now, if we put aside the advertising and
1 promotion, the cigarette, the tobacco, the thing
2 people put in their mouths and light up, was
3 essentially the same product in '63 as it had been
4 years before?
5 A. Reasonably so. The tar and nicotine had
6 changed, of course, because as brands had lowered
7 tar and nicotine, so it was actually a milder
8 in '63 than it had been back in the '50s.
9 Q. Otherwise still the same?
10 A. I believe so. But I'm not expert on that,
11 but I have no reason to believe they changed the
12 substantially.
13 Q. And then when you look at the history of
14 Marlboro, you've told us, "Come to Marlboro Country"
15 1963 was the breakthrough --
16 A. Well --
17 Q. -- in terms of steady rise?
18 A. No. Actually, I believe what I said today
19 was the breakthrough was actually the introduction
20 Marlboro Lights, and the fact that Marlboro parent
21 growing in the face of a low-tar introduction, which
22 other brand enjoyed.
23 Q. Marlboro Lights was introduced in what
24 A. 1971, 2. If you look at the sales charts,
25 you'll see that during the period of '71 to '78 was
1 period of Marlboro's great growth, in fact.
2 Q. By '78 it was number one?
3 A. Yes.
4 Q. And basically it just kept climbing for a
5 number of years: '78, '79, the early '80s?
6 A. It climbed until, I believe, 1992. 1992
7 was a stumble year for it.
8 Q. And the reason for that was the discount
9 brands?
10 A. Yes, sir.

11 Q. And Marlboro, for business reasons,
obviously
12 became very concerned about the success of the
discount
13 brands?
14 A. Very concerned.
15 Q. And as a matter of fact, we know from the
16 numbers that millions of people, millions of your
17 customers who were smoking either Marlboro Lights or
18 another member of the Marlboro family, went away in
the
19 millions and switched to the cheap cigarettes, which
20 were of obviously lower quality?
21 A. Doing a numbers game to see if I can agree
22 with millions.
23 Q. Well, you went from about 35 percent of
the
24 market to 21 percent of the market. That's
millions?
25 A. No, it hadn't gotten to 35 percent. And
it
34818
1 never got to 21. It was running at that rate. I'm
not
2 going to quibble. It's 5 -- don't know. But it's
3 fine. Fine.
4 Q. Fine, you say?
5 A. I agree with your statement.
6 Q. Okay, you agree.
7 So millions of Marlboro smokers left; you
8 went down to 21 percent and they went to the
cheaper,
9 low-quality brands?
10 A. Correct, as a general statement.
11 Q. As a general statement.
12 And there were a lot of meetings, a lot of
13 memos and a lot of worried people at Philip Morris:
14 How do we reverse this?
15 A. You are right.
16 Q. A lot of people making big, big money,
that
17 wanted to keep making big money: We've got to
figure a
18 way to get Marlboro on top again?
19 A. Well, I'm not sure that money was the
issue
20 and who made what kind of money. I was part of the
21 team. Even though I wasn't in Philip Morris USA
when
22 this was being worried about, I was part of the team
23 that looked at it. I'll tell you, my motivation had
24 nothing to do with money. My motivation was I had
25 helped build this brand and I didn't want to see it
34819
1 self-destruct.
2 Q. Whoever was instrumental in the decision,
as
3 things turned out you came up with a brilliant
4 decision, because it turned things around, and that
5 brilliant decision was Marlboro Friday, April 7,
1993,

Street 6 when you shocked the cigarette industry and Wall
pack? 7 and lowered the price of Marlboros by 20 cents a
up 8 A. Correct.
9 Q. And within a couple of years Marlboro was
10 at 35, from 21 to 35?
11 A. From a run rate of 21. It dramatically
12 improved its share, that is correct.
13 Q. And although Marlboro did not go down in
14 price to be as inexpensive, if that's the right
word,
15 as the discount brands, it was the first time that a
16 premium brand had uniformly, across the board
lowered
17 its price in a number of years, anyway?
18 A. Yes. Well, I believe that a couple of
19 premium brands lowered their price to become
discount
20 brands. But I think I know what you meant. And the
21 answer is yes.
22 Q. And whether it was at 21 percent or 35
23 percent, you may have remembered that on your
24 deposition I asked you the question: If someone,
Rip
25 Van Winkle, went to sleep for 35 years and then
picked

34820

1 up a Marlboro 35 years later, it was essentially the
2 same product, right?
3 A. Essentially.
4 Q. Same taste?
5 A. Modified by the fact it's an agricultural
6 product, but I agree, Philip Morris tries to keep
the
7 same taste characteristics in it, subject to the
8 vagaries of dealing with an agricultural product,
9 tobacco.
10 Q. And by 1998, Marlboro was selling 60
billion
11 more units, billion, 60 billion more units than they
12 had in 1993?
13 A. This is not a wise comment that I'm
making.
14 I don't know that because when I retired, I stopped
15 looking at the business. So I don't know what
Marlboro
16 actually --
17 Q. I think you said that in Minnesota.
18 A. I may have agreed with it. I just can't
19 attest to it. I'm not quarreling with you. I'm
sorry.
20 I'm just not saying I know that for a fact. But it
21 seems reasonable.
22 Q. Did you have anything to do with selecting
23 the cowboys that appeared in the Marlboro ads?
24 A. During what period of time?
25 Q. Well, let's start when you were brand

34821

1 manager.

2 A. Surely.
3 Q. And how were they selected?
4 A. They were selected by the agency bringing
in
good
or
that
5 ads, and we would pick which ads we thought were
6 Marlboro ads.
7 Q. It didn't matter if they were real cowboys
8 if they knew how to ride a horse; the only thing
9 mattered is that they looked like cowboys. I mean,
10 there was no authenticity requirement?
11 A. There was no written document that said,
12 "Shall be a cowboy," but I will tell you that the
13 cowboys in Marlboro advertising are cowboys.
14 Q. Did you ever see a movie called: Death in
15 the West?
16 MR. HEIM: Objection, Your Honor.
17 THE COURT: We'll talk about it.
18 (The following proceedings were had at
19 sidebar:)
20 MR. ROSENBLATT: He's talking to the jury.
21 THE COURT: Let's not talk to the jury.
22 Okay. Now, your objection is?
23 MR. HEIM: My objection is we had a long
24 discussion about the subject. Your Honor ruled that
25 Death in the West is inadmissible. And rather than

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to
as
and
or
Death
whatever
tobacco
1 keep going with this, I wanted to object to it as
2 as I heard it.
3 MR. ROSENBLATT: That was a ruling made a
4 long time ago. You made that ruling. You didn't
5 us show Death in the West. You, since then --
6 allowed them to cross examine on the CATO document.
7 want to ask him: Do you know what became of those
8 cowboys? I'm not proposing to show it.
9 Wakeham was in the movie, Bowling. I want
10 ask him if he knows those people.
11 THE COURT: You can ask him that. As far
12 the jury knows, Death in the West could be a Laurel
13 Hardy film. I don't want any reference made to it
14 to any of the content of it. The very fact that
15 in the West was a picture regarding tobacco,
16 it was, was not an advertising promotion of the
17 industry, so it's not in the realm of marketing and
18 advertising. It's an antitobacco document.
19 MR. ROSENBLATT: It was all about the
20 cowboys.
21 THE COURT: I don't care if there were
22 cowboys and indians in it. You can ask him if he

knows

23 Bowling.
24 MR. ROSENBLATT: If I'm not making
reference
25 to the film.

34823

1 THE COURT: It doesn't make any
difference.
2 He said they were real cowboys in the advertising.
I
3 don't know what you're going to say about the Death
in
4 the West. Because they said they weren't real
cowboys?

5 Death in the West showed that they were.
6 MR. ROSENBLATT: They were real cowboys
that
7 died, smoked their product and died of lung cancer.
8 THE COURT: They could have fallen in
9 quicksand and died, didn't make any difference.

They
10 were real cowboys.
11 Okay. Sustained.
12 (The sidebar conference was concluded, and
13 the following proceedings were held in open court:)
14 BY MR. ROSENBLATT:

15 Q. One of the basic tenets of cigarette
16 advertising and marketing was the concept of brand
17 loyalty, correct?

18 A. Oh, yes.

19 Q. And yet, the success of the discount
brands
20 totally turned that concept on its head, didn't it,
21 because there's no brand loyalty in discount brands?
22 A. That's not true. I think your statement

is
23 not incorrect; it just shouldn't be absolute.

24 Q. Page 112.

25 Page 112, Line 19 of the deposition you
gave

34824

1 in this case. And some of your answers are very
2 lengthy, so I'll just start -- we're obviously
talking
3 about discount brands.

4 And then the question is asked: The
discount
5 brands?

6 And your answer: The discount brands of
7 which we had some, and we were aggressively
8 participating in that category in the period leading
up
9 to Marlboro Friday, for a rather extended period of
10 time we sort of did a strategic re-evaluation of:

"Do
11 we really want to be in the discount business?" I
12 mean, there is no loyalty in discount brands and
people
13 are buying them strictly because of price. And the
14 data demonstrated very clearly that if this pack
were a

15 dollar 39 today, I would buy it. And if some other
16 brand were a dollar 31 tomorrow, I would buy that.
And
17 the people were zigging and zagging just around
brands.
18 If you want me to -- it's a long answer,
but
19 that's -- you want me to continue?
20 MR. HEIM: It goes on and on and on.
21 MR. ROSENBLATT: Exactly.
22 BY MR. ROSENBLATT:
23 Q. But focusing in on what I -- and these are
24 your words. These are your words.
25 A. I understand that.

34825

There

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brands"

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to

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1 Q. Two years ago, April 17, 1977 (sic):
2 is no loyalty in discount brands.
3 Is that true?
4 A. That is an overstatement.
5 Q. Your overstatement?
6 A. My overstatement, and in the sense that
7 is substantially less loyalty than there is in
8 brands, but it is incorrect of me to have said there
9 is -- what did I say, no loyalty?
10 Q. There is no loyalty --
11 A. "No" is too absolute a word, because there
12 were basic smokers, GPC smokers and Doral smokers,
13 which are discount brands, who were smokers of that
14 brand because they liked those brands. They liked
15 taste of them, the package, the name. "No" is too
16 absolute of a word, Mr. Rosenblatt, and I stand
17 corrected on that.
18 Q. But do you --
19 A. But "substantially less than premium
20 is correct.
21 Q. Do you stand by this statement with
22 to discount brands? And obviously you're referring
23 smokers: People are buying them strictly because of
24 price. And the data demonstrated that, very
25 if this pack were 1.39 today, I would buy it, and if
1 some other brand were 1.31 tomorrow, I would buy
2 In other words, you said if someone could
3 save 8 cents, they would change their brand of
4 cigarettes, not because of taste, not because of
5 flavor, strictly because of price?
6 A. Like the other comment, I believe that as
7 general statement, but not as an absolute statement.
8 Q. That was a phenomenon?
9 A. And it rocked the industry.
10 Q. And it rocked the industry?

11 A. Yes.
12 Q. And it rocked the smoking public, because
13 before Marlboro Friday, which I think was Good
Friday
14 in 1993, before Marlboro Friday, the percentage of
the
15 discount market in America had reached 39 percent.
16 That stunned all you experts, right?
17 A. Yes.
18 Q. Then how do you explain, if people ran
away
19 from Marlboro full-priced to the discount brands,
and
20 it went from the low 30s to 21 percent of the
market,
21 and then you lowered the price of Marlboros by a
mere
22 20 cents and got back up to 35 cents (sic), isn't
that
23 all essentially based on price?
24 A. It's based on -- the way I describe it is
25 this: We talked this morning about Marlboro's
equity,
34827
1 which I think admittedly is the strongest in the
2 industry. And Marlboro was the last brand to feel
the
3 impact of the discount brands. Marlboro's share
held
4 on much longer than other brands.
5 But equity, this equity is this
combination
6 of things that I described that creates a value in
the
7 consumer's mind. And I think what happened was that
8 Marlboro's equity, as strong as it was, was not
strong
9 enough to withstand the price differential between it
10 and the lower-priced brands, and people started
11 switching out of Marlboro.
12 When the price was lowered 20 cents, which
13 was not nearly all the way but closed the gap, if
you
14 will, that restored -- that narrow price gap
restored
15 the equity in Marlboro's power to stabilize the
brand.
16 Before you were asking me, "Isn't
advertising
17 the thing that made all the difference?" Here we
just
18 had a discussion of a switch of 14 share points in
the
19 industry, and advertising stayed exactly the same
and
20 the price changed.
21 So it can't be both advertising and price.
I
22 think brands change on a multitude of factors and
their
23 interrelationships.
24 Q. How much of the market do the discount

brands

25 have today?

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1 A. Well, I don't know. When I left it was
about 2 21, 21 or 22 percent. So they basically got halved
in 3 a 5-year period.

4 Q. And although on Marlboro Friday, in April
of 5 1993, you lowered the price across the board for
6 Marlboros about 20 cents per pack, in the
intervening 7 years, '94, '95, '96, '97, you slowly raised the
price 8 again two times a year, as you had done

historically?

9 A. No, I'm not sure that's a correct
statement.

10 I don't believe the price increase was two times a
11 year. And the rate-of-price increases after

Marlboro

12 Friday was substantially lower on a percentage basis
13 than the 1980s.

14 Q. Let me be clear about this.

15 After Marlboro Friday in 1993, whether it
was

16 one time a year or two times a year, the price of
the 17 Marlboros continued to rise on a yearly basis.

You're

18 saying it was a smaller increase than it had been --

19 A. And less frequent.

20 Q. But at least once a year?

21 A. I think -- I think that for Marlboro
Friday

22 the next price increase was 18 months. I think.

23 Q. But after that it was on a yearly basis?

24 You're not sure?

25 A. I'm not sure, but that sounds reasonable.

34829

1 Q. You went to work for Philip Morris in
1963.

2 And you've been discussing these various marketing
3 documents with Mr. Heim. And you've said that the
4 tobacco industry is controversial, and Surgeon
5 General's Reports, and the health issues and the
6 addiction issues, no one, no one is going to put in

a 7 document: "We're after kids. We're after
teenagers. 8 Let's market to the high schools." No one is going
to 9 put that in a document; isn't that correct?

10 A. If you are running an organization that
has

11 3,000 salespeople spread around the country, you
12 cannot, you cannot get an organization to do

something

13 without putting it in a written document. You can't
14 manage the company without written documents.

every 15 And the fact is that every activity for
And 16 week of every month of every year is documented.
17 the instructions of what to do are documented. And
18 there's no reference to a strategy or a program or a
19 review of a program or an activity that involves
20 marketing to kids. It didn't happen.
21 Q. Of course not. Everyone knows the rules
and 22 everyone knows the party line: "We do not market to
23 kids." Not a very hard mantra. "We don't market to
24 kids." We only spend billions of dollars for
25 competitor smokers. So no one is going to say in a

34830 1 document, who has been at Philip Morris for longer
than 2 10 minutes, that "We are trying to get nonsmokers to
3 begin smoking," or that "We are going after kids."
No 4 one is going to say that?
5 A. Mr. Rosenblatt, I don't know how to
respond 6 to you because it's a statement, not a question.
But I 7 was there. I ran the show for a large number of
years 8 in marketing and then the company, and I'm telling
you 9 it didn't happen. I was there; you weren't. And I
10 know.
11 Q. Let me --
12 A. So to speculate that it was going out
without 13 documents is just speculation on your part.
14 Q. Let me ask you something. Let's see if
you 15 have the number to this.
16 A. Okay.
17 Q. How many kids have chosen Marlboro as
their 18 first brand?
19 A. I have absolutely no idea.
20 Q. You don't want to know that number --
21 A. No --
22 Q. That number can only hurt you and Philip
23 Morris and completely turn on its head what you're
24 trying to present to this jury?
25 A. I disagree --

34831 1 Q. But --
2 MR. HEIM: Your Honor, let him answer the
3 question.
4 THE COURT: You've got multiple questions.
5 BY MR. ROSENBLATT:
6 Q. Wouldn't you agree --
7 THE COURT: If you can answer any of them.
8 BY MR. ROSENBLATT:
9 Q. Wouldn't you agree that since Marlboro has
35 10 percent of the market and the next cigarette has 5

sense 11 percent of the market, that it only makes common
12 that over the years, millions of nonsmoking kids who
13 started to smoke, who made a decision, "I'm going to
14 smoke," chose Marlboro as their first brand, and
15 wouldn't you also agree that the reason you don't
have 16 any idea about the number is because you don't want
to 17 know the answer?
18 A. The answer to your first question is it
makes 19 sense under -- if they smoke Marlboro today, under
35 20 share, they started with Marlboro and didn't switch.
21 It's not axiomatically clear that just because
Marlboro 22 has a 35 percent today, that every kid started with
23 Marlboro, because there is switching that goes on in
24 the industry. So that's sort of a purist's point.
25 The answer to your second question is, you

34832

1 say I don't want to know. And I will answer you by
2 saying this: Philip Morris has proposed that
vending 3 machines be eliminated in this country at great
risk, 4 business risk, to the company. With its trade
5 relations, Philip Morris has supported and pleaded
with 6 the states to enforce the laws about selling
cigarettes 7 to kids. And the fact is, Mr. Rosenblatt, if the
laws 8 of this country were obeyed and enforced by the
states, 9 there wouldn't be cigarettes sold to kids. So to
put 10 this on Philip Morris' back and say that I don't
know 11 because I don't want to know is really just not a
very 12 fair position.
13 Q. I think it's extraordinarily fair, because
it 14 would be a very easy thing to find out by doing what
15 Philip Morris is so good at, focus groups and
surveys 16 and polling, ask kids, ask kids. You've got 25
million 17 people in your database. Ask your smokers, ask
those 18 25 million people: "When you went from being a
19 nonsmoker to a smoker, what was your first brand?"
20 A. You, sir, are playing a game with me,
because 21 you know that I know that data and I know that you
know 22 that data, and the reason is that it's published by
the 23 government, isn't it? In the University of
Michigan.

under 24 And you and I both know that 65 percent of people
that 25 18 claim Marlboro is the regular brand. You know
34833
1 because you and I --
2 Q. What has that got to do with my question?
3 A. You asked me, shouldn't I know that how
many 4 people under the age of 18 started smoking Marlboro.
5 And I'm telling you that it's published information
6 from the government that Marlboro has around a 65
share 7 of below-legal-age smokers.
8 So I did know the number, Mr. Rosenblatt.
I 9 just don't go out and research it, because I
wouldn't 10 allow Philip Morris to do research among people
under 11 18 years old.
12 Q. Because you want to look good for PR
reasons, 13 that's why you don't do it. That's why you don't
14 verify it, so you can walk in here: "We don't
market 15 to kids. We're not after kids"?
16 A. Mr. Rosenblatt, I spent 35 years at Philip
17 Morris, and for 32 of the 35 I've never even thought
18 about being in a courtroom.
19 Q. First of all, you didn't spend 35 years --
20 A. I spent 30.
21 Q. You were at least 5 years --
22 A. I started 35 years ago.
23 Q. -- with the Atari video games, which was a
24 terrible failure, and you walked away with \$7
million 25 from Atari, right?
34834
1 A. Wrong.
2 Q. How much?
3 A. 9.
4 Q. 9 million. \$9 million. That's how big
5 business works in America. You leave Philip Morris
--
6 A. That's how Hollywood works.
7 Q. -- you go to the Atari video makers; it
bombs 8 out; it's a terrible failure; you walk away with \$9
9 million?
10 A. That's what my contract called for.
11 Q. And then you came back to Philip Morris
and 12 you went international, and then you went into the
food 13 business trying to sell that?
14 A. You keep saying international. You said
that 15 twice. I never worked --
16 Q. Any Philip Morris companies. What is
Philip

17 Morris Companies again? It's not the domestic
18 cigarette business --
19 A. The corporate.
20 Q. So you were in the corporate end, not
21 directly involved with marketing for about 10 years?
22 A. 3.
23 Q. No, but if you include the period of time
you
24 were out with Atari, and the period of time you were
25 with Philip Morris Companies, and period of time you

34835

1 were with Kraft, and the period of time you were
with
2 Miller, that's 10 years?
3 A. Out of the cigarette business.
4 Q. Out of the cigarette business,
5 A. Yes, sir. So that will give you 25 years
in
6 the cigarette business. 22 of those 25 years I
never
7 thought about being in a courtroom.

8 THE COURT REPORTER: I need a break, Your
9 Honor.
10 MR. ROSENBLATT: Let me just ask one more
11 question.

12 Q. I'll tell you something that you and I
know.
13 What you and I both know is that it's one thing to
talk
14 about the law. The reality is that retailers who
sell
15 to kids, until very, very recently, there was almost
16 never a conviction or a prosecution of a retail
store
17 that sold to kids. That was almost unheard of until
18 the last few years, because of all the publicity of
19 these kinds of cases?
20 A. That is correct, absolutely correct, which
21 means that the state had not enforced the laws.
22 Q. It's the state's fault?
23 A. It's a state law.
24 Q. Philip Morris -- got nothing to do with
25 Philip Morris; it's the state's fault that they

didn't

34836

1 enforce the law?
2 A. I don't know -- tell me what Philip Morris
3 could do.
4 THE COURT: I think we ought to break.
5 (A brief recess was taken.)
6 MR. ROSENBLATT: Judge, isn't there one
juror
7 that has to leave early on Tuesday?
8 THE COURT: Yes. On the end.
9 MR. MOSS: I think it was a six-week deal.
10 THE COURT: Somebody tells me there was
11 supposed to be somebody who was supposed to leave on
12 the 21st, Friday. But we're not going to be here on
13 Friday anyway.
14 Let's bring the jury in.
15 (The jurors entered the courtroom.)

16 THE COURT: All right. Have a seat.
 17 Up in the corner, are you still under the
 18 time frame that you had, that you have to go up to
 19 Broward?
 20 JUROR 907: No.
 21 THE COURT: You're finished with that job.
 22 We know about you.
 23 His is every Tuesday, that he used to go
 up
 24 there.
 25 And you have to be up there at 6:00?
 34837
 1 JUROR 622: Yes, sir.
 2 THE COURT: I think what counsel is saying
 is
 3 he'd like to quit.
 4 THE WITNESS: Fine with me.
 5 MR. ROSENBLATT: You're here tomorrow, in
 any
 6 event. You ain't going nowhere.
 7 THE WITNESS: Yes.
 8 THE COURT: Gentlemen, please. Fun and
 games
 9 is okay for a while.
 10 If there's any value to you coming in and
 11 continuing at this point and you have a point you
 want
 12 to make, fine. If not, we can pick it up tomorrow.
 13 We've been here all day and I'm sure you
 14 folks are anxious to get home, too.
 15 We can do that. We can break now and come
 16 back tomorrow, usual time. Wednesday, 9:15. Get
 17 underway at 9:30, and finish up with the witness.
 18 All right. So the same rules will apply
 19 overnight, folks. Do not discuss the case, reach
 any
 20 conclusions, or see anything that has any relevance
 to
 21 this case.
 22 You, too. Same rules apply.
 23 (The jurors exited the courtroom.)
 24 THE COURT: All right. You're excused
 until
 25 tomorrow morning, 9:30. And you'll have to tell us
 34838
 1 what your plans are somewhere along the line as we
 2 continue on.
 3 Okay. Unless there's anything further we
 4 have to discuss --
 5 MR. ROSS: Judge, a little minor
 housekeeping
 6 matter. Yesterday, we when were putting in some
 7 Lorillard documents, we ended up with some confusion
 8 about Defendants' Exhibit 14188. The document that
 we
 9 identified yesterday as 14188 should be 14183.
 10 THE COURT: 14183.
 11 MR. ROSS: It looked like an 8 on the
 copy.
 12 THE COURT: Mr. Martinez, you said
 something

13 about having those documents that you wanted to
14 present.
15 MR. MARTINEZ: Yes, sir. I got those
16 documents that I told you would be coming in, and
17 Mr. Rosenblatt said he wanted to show them to Susan.
I
18 have them here and I can introduce them. It will be
19 Defense Exhibit 3181. It's the law pamphlet that
was
20 sent to the different people. So it's available
21 whenever Susan approves it or doesn't.
22 THE COURT: Okay. Unless there's any
other
23 business we can attend to at this moment --
24 MR. HEIM: Your Honor, the only other
point
25 that I would raise, and I know I'll probably sound a
34839
1 little bit like a broken record here, but assuming
that
2 we finish tomorrow, and we have a holiday on Friday,
I
3 know that leaves Thursday to figure out later, but,
4 again, I would urge that if we could get the
5 identification of whoever the Monday -- I'm assuming
6 Monday -- the rebuttal witness is intended to be or
7 witnesses intended to be. We can then use the time
8 probably to argue, both sides, as to whether or not
9 it's an appropriate rebuttal witness. Without
10 identification, there's no way to do that.
11 MR. ROSENBLATT: I'll try to let them know
12 tomorrow morning.
13 THE COURT: Because if you do that, then
we
14 can utilize Thursday for that kind of an argument,
and
15 we wouldn't be really wasting a lot of time, and we
can
16 bump into Monday.
17 MR. MOSS: The truth of the matter is, if
we
18 can have -- I don't know how many rebuttal
witnesses.
19 Your Honor indicated that obviously it was not going
to
20 be any rebuttal -- if there are any, it's not going
to
21 be a witness a day. Your Honor indicated you
22 thought -- yesterday you made a comment --
23 THE COURT: I took my cue from
24 Mr. Rosenblatt, because he said it wasn't going to
be
25 very long, a few minutes with some and maybe a
little
34840
1 bit longer with others.
2 MR. MOSS: That's fine. If that's what
he's
3 told Your Honor, that's fine. The point I'm trying
to
4 make is, so that we can utilize Thursday, because

it's
first
that
don't
tell
who
that
of
40s.
for
34841
5,
jurors
lost
incurred
house
a
yet,
know,
have

5 important, we need to know more than just who the
6 one is. And that's not unfair. I mean --
7 THE COURT: We're going to try and get
8 information to you. We'll do the best we can. I
9 know who he's going to use, and I would hope that by
10 Thursday you'll be able to tell us at least some.
11 MR. MOSS: I think he indicated he would
12 us tomorrow.
13 THE COURT: I said by Thursday.
14 MR. ROSENBLATT: I'll tell you tomorrow
15 we intend to call on Monday.
16 THE COURT: Then by Thursday, maybe we can
17 argue the rest of them. That's the point.
18 MR. MOSS: That's fine.
19 THE COURT: Because there may be things
20 we have to look at by way of the record to make that
21 determination before we can even rule on the issue
22 rebuttal acceptance. How many pages, 35,000?
23 MR. ROSENBLATT: I think we're on to the
24 MR. HEIM: We have a search capability,
25 those of us who know how to use it.

1 THE COURT: I've got an interesting little
2 tidbit here from Minnesota regarding the jurors.
3 Hasn't come up here yet. Just for academic
4 information. From the Minneapolis Star Tribune, May
5 Associated Press story, that three tobacco trial
6 stand to divide almost \$30,000 to cover financial
7 hardships in the Minnesota case.
8 What happened was the House in Minnesota
9 voted to approve a plan to pay foreclosure costs
10 over time and other costs that the jurors had
11 incurred in the four-month trial. The juror there had a
12 foreclosed on, had lost wages and other things, took
13 bill to the legislature and they passed it, which is
14 one way of compensating these folks here for long
15 trials. Although they haven't made any complaints
16 there's precedent.
17 MR. HEIM: I think the problem out there,
18 Judge -- I've heard these stories. Just so you
19 it's interesting, unlike Dade County, they did not
20 a provision that their salaries had to be continued.
21 And as a result, the very small amount that got paid

to
22 jurors, people lost their income.
23 THE COURT: May anticipate a problem of
that
24 nature if this thing goes into summertime.
Assuming,
25 while we're looking ahead, let's supposing, for
example
34842
1 that a juror who happens to be working for a company
2 has a vacation time coming up in the summertime,
wants
3 to take their vacation. The boss says, "Look, you
4 haven't been here for a year. I'm not going to give
5 you your vacation." Now they're going to complain.
6 They're losing their vacation time. Who knows what
7 they're going to think? These are things you can go
on
8 ad infinitum in your brain about this jury.
9 Then we have the one school teacher who
has a
10 summer job he may lose because of it. I don't know.
11 We'll just play with it.
12 All right, folks. We'll see you tomorrow.
13 (Court was adjourned at 4:30 p.m.)
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